Petition

FILED
FEB 8 1982
ALEXANDER L. STEVAS,
CLERK

81-1497

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROBERT CHEVERES, PETITIONER

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA, GLENDA CHEVERES MILLER, (Real Party in Interest), RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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Professional Law Corporation
By RALPH E. McCARTHY
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Counsel for Petitioner

QUESTION PRESENTED

Whether this court's decision in **McCarty v. McCarty,** (June 26, 1981) 453 U.S. _____, 101 S.Ct. 2728, 69 L.Ed. 2d 589, holding the Supremacy Clause, U.S. Const. Art. VI, C1. 2 precluded state courts from dividing federal military retirement pensions pursuant to state community property laws, is retroactive as to cases final before that decision.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 1981

ROBERT CHEVERES, PETITIONER

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE OCUNTY OF VENTURA, GLENDA CHEVERES MILLER, (Real Party In Interest), RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

Petitioner, Robert Cheveres respectfully prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal for the Second Appellate District, Division Five, entered on October 27, 1981 (hearing denied by the Supreme Court of California on November 25, 1981).

OPINIONS BELOW

The Respondent, Superior Court of State of California for the County of Ventura, denied Petitioner's motion by minute order dated September 2, 1981, which is reproduced and appears in the Appendix, marked Exhibit A. The Supreme Court of California ordered Petitioner's application for a writ of mandate and/or certiorari transferred to the California District Court of Appeal, Second Appellate District by order filed October 19, 1981. A reproduction of said order appears in the Appendix marked Exhibit B. The District Court of Appeal, Second District denied Petitioner's application without opinion on October 27, 1981. A reproduction of the order denying appears in the Appendix hereto, marked Exhibit C. The petition for hearing was denied without opinion by the Supreme Court of California on November 25, 1981. A reproduction of the order appears in the Appendix hereto marked Exhibit D.

JURISDICTION

The order of the District Court of Appeal of California, Second Appellate District, was entered on October 27, 1981. This petition has been filed within 90 days (see 28 U.S.C. 2101 (c); Rule 20(2), United States Supreme Court Rules) of the denial of hearing by the Supreme Court of California on November 25, 1981, (Appendix Exhibit C), at which time Petitioner exhausted review at the state court level. See **American Railway Express Co. v. Levee,** (1923) 263 U.S. 19, 20-21, 44 S.Ct. 11, 68 L.Ed. 140. This court has federal question jurisdiction on certiorari under 28 U.S.C. §1257(3), since Petitioner claims here and claimed below rights based on the United States Constitution, in particular Article VI, Clause 2 and Article III, Section 2.

QUESTION PRESENTED

Whether this court's decision in **McCarty v. McCarty,** (June 26,1981) 453 U.S. __,101 S.Ct.2728,69 L.Ed.2d 589, holding the Supremacy Clause, U.S. Const., Art. VI, C1. 2 precluded state courts from dividing federal military retirement pensions pursuant to state community property laws, is retroactive as to cases final before that decision.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article VI, Clause 2 of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Article III, Sections 1 & 2 of the United States Constitution provide in pertinent part:

> "Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ."
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . "

STATEMENT OF THE CASE[1]

Petitioner and Respondent Real Party In Interest, Gloria Cheveres Miller entered into a Property Settlement Agreement which was incorporated into In-

1. To avoid unnecessary burden on the Court, Petitioner has not elected to file the record with the Court as permitted by Rule 19(.1), United States Supreme Court Rules. However, when required by Rule 21 (1 h) and the Court's convenience in the event it requests the record, specific references to the record are given.

terlocutory and Final Judgments of Dissolution of Marriage entered on August 29, 1979 by Respondent Superior Court of the State of California for the County of Ventura. Those judgments in part awarded Respondent Real Party In Interest portions of Petitioner's U.S. Military Retirement Pension as community property.

On August 4, 1981 Petitioner collaterally attacked those portions of the Judgments dividing Petitioner's U.S. Military Retirement Pension by filing his Motion to Set Aside and Declare Void those Portions of the Interlocutory and Final Judgments awarding Glenda Cheveres Miller any interest in Petitioner's U.S. Military Retirement Pension, relying on the federal supremacy clause of the U.S. Constitution which had been held by the U.S. Supreme Court to preclude a state court from dividing any interest in U.S. Military Retirement Pensions in **McCarty v. McCarty,** (June 26, 1981) 453 U.S. _____, 101 S.Ct. 2728, 69 L.Ed. 2d 589, and contending that decision applied retroactively. (Points and Authorities in Support of Motion, pages 3-10). The Respondent Court denied the Motion by minute order filed September 2, 1981. (Appendix Exhibit A)

On October 9, 1981 Petitioner presented his Petition for Writ of Mandate and/or Certiorari, originally to the Supreme Court of California in the first instance, which ordered the matter transferred to the District Court of Appeal of California, Second Appellate District on

October 19, 1981. (Appendix Exhibit B) In his Petition, (Points and Authorities p. 8-22), Petitioner directly raised the question of whether under the Supremacy Clause of the U.S. Constitution the decision of the U.S. Supreme Court in **McCarty v. McCarty, supra,** applied retroactively, contending retroactivity of U.S. Supreme Court decisions was a federal question under Article III, Section 2 of the U.S. Constitution and that those provisions as well as decisions of the U.S. Supreme Court required retroactive application. The District Court of Appeal of California, Second Appellate District denied said Petition without opinion on October 27, 1981. (Appendix Exhibit C) Thereafter, Petitioner filed his Petition for Hearing with the Supreme Court of California seeking review of the denial by the District Court of Appeals, again raising exactly the same constitutional questions (Argument, Pt. III, p. 8-13) and the Supreme Court of California denied the Petition for Hearing without opinion on November 25, 1981 (Appendix Exhibit D) at which time Petitioner exhausted review at the state court level.

REASONS FOR GRANTING WRIT

I. THE STATE COURT HAS DECIDED THE IMPORTANT QUESTION OF RETROACTIVITY OF THIS COURT'S DECISION IN **McCarty v. McCarty,** WHICH HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

On June 26, 1981, this court handed down its opinion in **McCarty v. McCarty** (June 26, 1981) 453 U.S. _____, 101 S.Ct. 2728, 69 L.Ed. 2d 589. The direct holding in **McCarty** was that the Supremacy Clause, U.S. Constitution, Art. VI, C1. 2, precluded a state court from applying its marital property laws to divide or award any interest in federal nondisability military pensions to the nonmilitary spouse. The court emphasized that the inducement attracting persons into the military service set forth by the federal military retirement plan, was peculiar under the war powers of the federal Congress and that the military retirement provisions of the federal statutes did not recognize state community property laws and any such recognition would be in direct conflict with the supremecy clause of the U.S. Constitution.

The **McCarty** opinion does not indicate or determine in any manner whether it was to be applied retroactively or prospectively or the degree thereof.

The effect of the state court's ruling in this case has been to deny full retroactivity to the **McCarty** decision.

California, as well as other states, is fortunate to have a large number of federal military establishments and presumably thousands of military personnel residing throughout the state. Prior to **McCarty**, it would seem clear large numbers of military personnel have entered into marital dissolution and divorce litigation, as well as private marital property settlement agreements all based under the clear California law that existed for years applying marital community property laws to federal military pensions. See e.g., **Stenquist v. Stenquist,** (1978) 21 C.3d 779, 148 C.R. 9. Since the **McCarty** decision, all of said judgments and contracts, and all of the rights of said persons regarding military pensions remain subject to doubt until it is definitively decided by this court whether or not the **McCarty** decision applies retroactively, and if so, to what degree.

Further, it is clear that many of the persons involved, in California and other states, will and have sought redress in the lower courts resulting in a multiplicity of actions, and very likely, a conflict in opinions in the lower courts until the basic question of retroactivity is decided by this court.

This court has not as of this writing, decided the question of retroactivity of **McCarty** so far as can be determined. It is readily apparent that retroactivity of this court's decision is clearly a question of federal, not state, law and this court is of course the final arbiter of the retroactivity of its own decision, under Art. III of the U.S.

Constitution. See e.g., **Free v. Blan,** (1962) 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 2d 180. For instance in **Simpson v. Union Oil Co.,** (1969) 396 U.S. 13, 14, 90 S.Ct. 30, 24 L.Ed. 2d 13 the court states:

> "Formulation of a rule of law in an Article III case or controversy which is prospective as to the parties involved in the immediate litigation would be most unusual, where the rule announced was not innovative."

Clearly this court, therefore, should decide definitively for uniformity of decision and the guidance of all lower courts the question of retroactive or non-retroactive application of the **McCarty** decision.

II. THE STATE COURT HAS DECIDED THE QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The prior decisions of this court clearly establish that the constitutional decisions of this court are fully retroactive. This has been the rule ever since **Norton v. Shelby County,** (1886) 118 U.S 425, 6 S.Ct. 1121, 30 L.Ed. 178, and the rule was more recently stated in **Robinson v. Neil,** (1973) 409 U.S. 505, 507, 93 S.Ct. 876, 35 L.Ed. 178, as follows:

> ". . . both the common law and our own decisions recognized the general rule of retrospective effect for the constitutional decisions of this court . . ."

While **this** court clearly can hold one of its decisions to be prospective or retroactive in operation, such as those

involving procedural criminal questions, **Linkletter v. Walker,** (1965) 381 U.S 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 and even in exceptional circumstances in cases involving non-procedural constitutional questions, **Chevron Oil Co. v. Huson,** (1971) 404 U.S 97, 92 S.Ct. 349, 30 L.Ed. 2d 296, nevertheless unless, and until, **this** court has definitively held to the contrary, the rule of full retroactivity applies to the constitutional decisions of **this** court under Art. III of the U.S. Constitution and the lower courts, both state and federal, are required by the decisions of this court referred to above to follow the general rule of full retroactivity. Since the state court here has failed to follow the rule of full retroactivity, and since this court has apparently not yet decided to limit retroactivity of **McCarty,** this court should now decide the important question presented.

III. THE **McCARTY** DECISION SHOULD BE HELD FULLY RETROACTIVE.

In those unusual cases in which this court has held nonprocedural constitutional decisions to be non-retroactive in operation, the court generally relies on three separate factors. Thus, in **Chevron Oil Co. v. Huson,** (1971) 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296, this court stated a three prong test to determine the question of retroactivity of this court's decisions;

(1) Whether a decision established a new rule of law,
(2) Whether the history, purpose and effect of the ruling was forwarded by retroactivity, and
(3) Whether retroactivity would produce inequities.

Since prior to the **McCarty** decision this court has not previously ruled on the question of whether military pensions were affected by community property laws, it is a matter of semantics whether a new rule of law is involved or a declaration of past law. However, even assuming a new rule of law, the test requires a determination of the purpose of the rule and consideration of that purpose clearly shows retroactivity would forward the purpose and effect of the rule.

The court in **McCarty** discussed the extremely sensitive nature of the war powers of the Congress of the United States, and emphasized a policy of encouraging military enlistments based on retirement advantages under the federal act. The court pointed out that application of community property laws in addition to conflicting with congressional intent, constituted "grave harm to clear and substantial federal interest". In so doing the court emphasized that the retired officer remains a member of the branch of service involved, that he or she continues to be subject to the Uniform Code of Military Justice, that he or she may forfeit all or part of his or her retired pay by engaging in certain activities, and that he or she remains subject to recall to active duty at any time. The court concluded that the purpose of Congress in enacting the

military retirement system was to provide for the retired service member, to meet the personnel management needs of the active military services and that the community property system had the potential to frustrate each of these objectives. The court observed that application of community property laws diminshed the benefit Congress intended should go to the retired service member, further diminished the value of pay as an inducement for enlistment or reenlistment in the military service and that application of community property laws directly interfered with the congressional desire to attract a youthful military and encourage orderly promotion.

It is obvious that the purpose of the congressional act is forwarded by a holding of retroactivity. As to all those persons situated as Petitioner is in this case, the reward incentives for being connected with the United States military services are directly decreased by a holding of non-retroactivity. If it is justified under the supremacy clause to deny California the right to apply its community property laws to future cases, it likewise follows the same public policy reasons apply to pre-existing cases. In short, the war power of the United States Congress is so peculiarly sensitive that the policy of the statute would be promoted by holding the same retroactive, not prospective, whether past or future.

It can be seen that interference with military pensions by state courts could literally wreck havoc with the

military war power of the United States Congress. Furthermore, it would automatically create an inequality between community property and non-community property states throughout the country which would seriously disturb the functioning of the United States military. For instance, since **McCarty,** does the spouse have a right to the portion of military retirement accrued before **McCarty,** or not? If **McCarty** is prospective only, perhaps the spouse would, and if retroactive, would not. For all these reasons it is apparent that the purpose and effect of the**McCarty** decision would be forwarded by holding it uniformly retroactive in all cases no matter when accrued.

As to the final factor of alleged inequities imposed by retroactive application, it is clear that there is no constitutional objection to interfering with contract. See **Title Oil Co. v. Flannagan,** (1924) 263 U.S. 444, 444 S.Ct. 197, 68 L.Ed. 382, directly holding that the **ex post facto** provisions of the constitution apply only to legislative acts not to court decisions and that retroactivity does not violate the due process or **ex post facto** provisions of the constitution as applied to judicial decisions.

Under California law, it is clear that any underlying contract was merged and extinguished by the state court action in entering an interlocutory decree and therefore the only rights between the parties existing, lie in the decree itself and not in any underlying contract. **Foust v. Foust,** (1956) 47 C. 2d 121, 302 P.2d 11.

Therefore, the parties obviously should be held to the notice that when they incorporate a stipulation into a decree and make it a court order, that the court order determines their rights and if the court order is subsequently declared void or unconstitutional, they should expect the effect of retroactivity.

A fair consideration of the extreme importance to the military as decreed by Congress in the military retirement act, versus any inequities, clearly leads to the conclusion the **McCarty** decision should be held fully retroactive.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal for the Second Apellate District, Division Five, entered on October 27, 1981 (hearing denied by the Supreme Court of California on November 25, 1981).

Respectfully submitted,

RALPH E. McCARTHY PROFESSIONAL LAW CORPORATION
By Ralph E. McCarthy

Counsel for Petitioner.

Appendix

SUPERIOR COURT STATE OF CALIFORNIA
COUNTY OF VENTURA

DATE: September 2, 1981 TIME: 9:00 A.M.

Hon: MARVIN H. LEWIS JUDGE
ANNETTE STEWART Deputy County Clerk
Deputy Sheriff
Court Reporter

GLENDA CHEVERES
No. D. 98322 VS. Counsel for
ROBERT CHEVERES Counsel for

NATURE OF PROCEEDINGS: ORDER ON MOTION

This matter having heretofore been heard and submitted to the court for consideration and decision, and the court having duly considered the same, now orders that respondent's motion to vacate and set aside the order in the Interlocutory and Final Judgments awarding petitioner an interest in respondent's military retirement is denied. See **Mahone v. Mahone**, 81 Daily Journal D.A.R. 2647 (C.A. 2nd, August 26, 1981).

ROBERT L. HAMM, County Clerk by /s/ Annette Stewart
Deputy County Clerk

MINUTES

EXHIBIT A

Supreme Court
FILED
Oct 19 1981
Laurence P. Gill, Clerk

Deputy

LOS ANGELES NO. 31475
IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA
IN BANK

CHEVERES

v.

SUPERIOR COURT, VENTURA

The above entitled proceeding is transferred to the Court of Appeal, 2nd Appellate District.

Bird, C

Chief Justice

EXHIBIT B

Clerk's Office

COURT OF APPEAL OF STATE OF CALIFORNIA

Second Appellate District

ROBERT CHEVERES	)	CIVIL No. 63789
	)	
vs	)	
	)	
SUPERIOR COURT OF VENTURA COUNTY.	)	
	)	
GLENDA CHEVERES MILLER, RPI S.C. D 98322	)	
	)	

Minutes of OCTOBER 27, 1981

DIVISION FIVE

Civil No. 63789 Cheveres vs. Superior Court Ventura County (Miller RPI)

The Court:

Petition for writ of mandate/certorari denied.

Clay Robbins, Clerk

EXHIBIT C

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

ROBERT CHEVERES,	)	
	)	
Petitioner	)	CIVIL NO. 63789
	)	
vs.	)	
	)	
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA,	)	
	)	
Respondent,	)	
	)	
GLENDA CHEVERES MILLER,	)	
	)	
Real Party In Interest.	)	
	)	

NOVEMBER 25, 1981

2 Civ. 63789 Div. 5

Cheveres, Petitioner
v.
The Superior Court of Ventura County, Respondent;
Miller, Real Party In Interest
Kaus, J., did not participate
Petition for hearing DENIED.

CLERK

EXHIBIT D

Opposition

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A Professional Corporation
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Ventura, CA 93006
(805)656-4223

Attorneys for Glenda Cheveres Miller

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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

ROBERT CHEVERES, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA, GLENDA CHEVERES MILLER, (Real Party In Interest), Respondents.	CASE NO. 81-1497 RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Real Party In Interest, GLENDA CHEVERES MILLER, by and through her counsel respectfully replies to the Petition For Writ of Certiorari as follows:

I

THE PETITION FOR WRIT OF CERTIORARI IS PREMATURE

A. Rule 17 of the Rules of the Supreme Court of the United States delineates the criteria upon which the Court is to rely in exercising its discretion to grant such a writ.

"Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a

matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari."

B. The merits of the issue of the retroactivity of the decision in McCarty v. McCarty (June 26, 1981) 453 U.S. _____, 101 S.Ct. 2728, 69 L.Ed. 2d 589 have not yet been decided by the California Supreme Court or California Court of Appeal as between this Petitioner and Real Party In Interest. As counsel's declaration, attached hereto as Exhibit 1 and by this reference incorporated herein as though fully set forth, demonstrates Robert

Cheveres served a Notice of Appeal on Glenda Cheveres Miller on October 29, 1981 from the order of the Supreme Court of the State of California for the County of Ventura dated September 2, 1981, denying his motion to vacate and set aside the order in the Interlocutory and Final Judgments awarding Glenda Cheveres Miller an interest in his military retirement. No briefs have yet been filed by either party in pursuit of that appeal, nor are they yet due under the California Rules of Court. A prehearing conference is presently scheduled on June 1, 1982 with counsel and Justice L. Thaxton Hanson of the Court of Appeal. If the matter is not resolved in conference, then briefs will be due and a decision will follow in due course. Therefore, we are a long way from an appellate determination that may present this Court an issue upon which it may wish to exercise its discretion.

Dated: April 27, 1982

HEILY, BLASE & ELLISON

By _____
DeWITT F. BLASE
Attorneys for
GLENDA CHEVERES MILLER

DECLARATION OF COUNSEL

I, JOHN H. PATTIE, declare that:

1. I am an attorney admitted to practice before all courts of record in the State of California but not before the Supreme Court of the United States.

2. I am associated in the practice of law with David R. Ellison who is admitted to practice before the United States Supreme Court as well as all courts of record in the State of California. The firm name is Heily, Blase & Ellison, a Professional Corporation. Mr. Ellison, who originally executed the appearance form in this matter is out of the County of Ventura. A member of the firm, DeWitt Foster Blase, who is also a member of this Court has therefore executed the Response in his stead.

3. Real Party In Interest herein, Glenda Cheveres Miller, consulted me December 5, 1978 about obtaining a dissolution of her eighteen (18) year marriage with Robert Cheveres. In due course, a summons and petition were filed and served through the Superior Court of the State of California in and for the County of Ventura which assigned case no. D 98322 to the proceedings. Robert Cheveres was represented by counsel, Ralph E. McCarthy, and in due course a Property Settlement Agreement was executed by all parties and their attorneys. There was never a contested hearing in the matter. The matter proceeded by stipulated default and the Court incorporated the Property Settlement Agreement into the Interlocutory Judgment (see Exhibit "A" attached to this declaration which is hereby incorporated by reference as though fully set forth). A Final

Decree of Dissolution was obtained by Mr. Cheveres concurrently with the Interlocutory Decree on August 29, 1979.

4. On August 4, 1981, Robert Cheveres filed in the Ventura County Superior Court an amended motion to vacate and set aside the Interlocutory Judgment awarding Glenda Cheveres Miller any interest in Respondent's military retirement pay. That motion was denied on September 2, 1981.

5. On or about October 12, 1981, Robert Cheveres filed a Petition for Writ of Mandate or Certiorari in the Supreme Court of the State of California (No. 31475) which Court on October 19, 1981 transferred the petition to the Court of Appeals, Second Appellate District. That Court denied the petition on October 17, 1981 (No. 63789). The California Supreme Court denied a Petition for Hearing on November 25, 1981 (No. 63789).

6. However, on October 29, 1981, Robert Cheveres also filed a Notice of Appeal (see Exhibit "B" attached hereto and is hereby incorporated by reference as though fully set forth). The case is still on appeal. It has been assigned case no. Civil No. 64558 in the Second Appellate District of the Court of Appeals of the State of California. No briefs have yet been required. On June 1, 1982, a prehearing conference is to be held. If the matter is not resolved at that prehearing conference the formalities of appeal will proceed (see Exhibit "C" attached hereto and hereby incorporated by reference as though fully set forth).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 27th day of April, 1982 at Ventura,

California.

JOHN H. PATTIE

Appendix

Name, Address and Telephone Number of Attorney(s)

RALPH E. McCARTHY
LAW OFFICES OF RALPH E. McCARTHY
PROFESSIONAL LAW CORPORATION
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Attorney(s) for Respondent

Space Below for Use of Court Clerk Only

FILED
AUG 29 1979
ROBERT L. HAMM, County Clerk
By B. Delgado
Deputy County Clerk

ENTERED ON _____
BOOK _____ OF JUDGMENTS, PAGE _____

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

In re the marriage of

Petitioner: GLENDA CHEVERES

and

Respondent: ROBERT CHEVERES

CASE NUMBER

D 98322

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on August 29, 1979 (Date) before the Honorable MARVIN H. LEWIS

Department No. 7.

The court acquired jurisdiction of the respondent on 12/12/78 (Date) by:

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☒ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

IT IS FURTHER ORDERED AND DECREED that the PROPERTY SETTLEMENT AGREEMENT of the parties herein, filed June 13, 1979, be and hereby is ratified and approved and each party is ordered to perform each and every covenant therein on his or her part to be performed, and said document is integrated and incorporated herein.

Dated August 29, 1979

Marvin H. Lewis
Judge of the Superior Court

HEILY, BLASE, ELLISON & WELLCOME
A PROFESSIONAL CORPORATION
220 SOUTH A STREET
OXNARD, CALIFORNIA 93030
PHONE: (805) 483-9563

(SPACE BELOW FOR FILING STAMP ONLY)

FILED
JUN 13 1979
ROBERT L. HAMM, County Clerk
By _____ Deputy County Clerk

Attorneys for Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

In re the marriage of Petitioner: GLENDA CHEVERES and Respondent: ROBERT CHEVERES	Case No. D 98322 PROPERTY SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED by and between the parties herein that:

1. Custody of the minor children of the parties, namely, TERESA L., born 1/17/63, and MONIQUE, born 8/23/66, shall be awared to Petitioner with the right of reasonable visitation to the Respondent. Such visitation is defined as liberal and reasonable as agreed between the parties herein.

2. The Petitioner shall be allowed to remove the minor children from the state of California without the written consent of the other party or prior order of the Court.

3. The Respondent shall pay to Petitioner for the support of the minor children the sum of $250.00 per month per child for a present total of $500.00 payable one-half on the first and fifteenth days of each month consecutively commencing

January 1, 1979 and to continue until further order of the court, or with termination by operation of law.

4. As and for additional support for the minor children the Respondent shall maintain for their benefit medical and hospital insurance which is available to him for a long as said beneficiaries are legally eligible. The parties agree to share equally any expenses for medical or hospital expenses incurred for the minor children which are not covered by any plan that is in effect until the minor children reach the age of 18 year of age, respectively.

5. Respondent may declare the minor children as his dependents for federal and state income tax purposes. Petitioner and Respondent shall file a joint federal tax return for any year legally allowed if it is to each of their economic benefit. Any tax due or refund allowed shall be divided according to their individual income for the tax year in question.

6. The petitioner shall be awarded the exclusive use and possession of the following:

(a) Her choice of the household furniture and furnishings.

(b) The horse and its trailer.

(c) The 1977 Chrysler Cordoba, unemcumbered.

(d) One-half the pasture land in Florida, minus four acres, to be held as tenants in common with respondent if not capable of being divided in kind.

(e) Her one-half of the already divided savings.

7. The respondent shall be awarded the exclusive use and possession of the following:

(a) The family residence located at 1331 Lakehurst, Oxnard, California together with the indebtedness thereon.

(b) That household furniture and furnishing not selected by petitioner.

(c) Policies of life insurance insuring his life.

(d) His one-half of the already divided savings.

(e) One half the pasture land in Florida, plus four acres, to be held as tenants in common with petitioner if not capable of being divided in kind.

8. Petitioner and respondent waive any and all rights they may have to receive spousal support from the other party. Each party hereby acknowledges their understanding that when the court approves this stipulation and incorporates the same within the judgment, neither party can be awarded spousal support in the future.

9. The Respondent shall pay the following community obligations and hold the petitioner harmless therefrom:

(a) All monthly payments on the Chrysler Cordoba (Forbes Credit Union).

(b) Bankamericard.

(c) Mastercharge.

(d) Levitz.

(e) Sears.

(f) Penneys.

(g) Doris Caplan

(h) Any other community debts up to their date of separation.

10. The Respondent shall maintain a policy of life

insurance in the amount of $50,000 on his life with the minor children of the parties named as the beneficiaries of that amount or its double indemnity value if the policy so provides until the youngest child reaches the age of eighteen (18) years old.

11. The Petitioner and Respondent shall be restrained from annoying, harassing, molesting, or disturbing the peace of the other directly or indirectly or in any manner whatsoever.

12. Each of the parties shall be restrained from making derogatory remarks about the other to or in the presence of the minor children.

13. Respondent's gross military retirement shall be divided on the basis that he completed 277.5 months of service before retirement, and that the marriage existed 211 months during that period of service, and wife is entitled to one-half the product of the length of marriage divided by the length of service multiplied by his gross retirement.

i.e., $1/2 \times \frac{211}{277.5} \times \$1,329.11^* = \$505.30$

*Present gross pay subject to revision according to benefit

If petitioner predeceases respondent, her interest in his military retirement shall revert to him.

14. Each of the parties shall execute forthwith all documents necessary to carry out the terms of this agreement.

15. This stipulation shall be deemed incorporated in and made a part of the minute order by reference thereto and as though the same were fully set forth therein.

16. Findings of fact and conclusions of law are waived by both parties herein.

17. Notice of trial is waived by both parties herein.

18. All rights of appeal from the Interlocutory Judgment are waived by both parties herein.

Dated: 13 Feb 79, 1979.

Glenda Cheveres
GLENDA CHEVERES, Petitioner

Robert Cheveres
ROBERT CHEVERES, Respondent

APPROVED AS TO FORM:

HEILY, BLASE, ELLISON & WELLCOME

By: John H. Pattie
JOHN H. PATTIE
Attorneys for Petitioner

By: Ralph E. McCarthy
RALPH E. McCARTHY
Attorney for Respondent

ACE BELOW FOR FILING STAMP ONLY)

LAW OFFICES OF
RALPH E. McCARTHY
PROFESSIONAL LAW CORPORATION
10TH FLOOR - FINANCIAL PLAZA TOWER
500 ESPLANADE DRIVE
P. O. BOX 6408
OXNARD, CALIFORNIA, 93031
(805) 647-8726 • (805) 485-0523

Attorneys for Respondent, ROBERT CHEVERES

RECEIVED
OCT 30 1981
CLERK SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

In re the Marriage of: Petitioner: GLENDA CHEVERES and Respondent: ROBERT CHEVERES	CASE NO. D 98322 NOTICE OF APPEAL; NOTICE DESIGNATING PAPER AND RECORDS FOR INCORPORATION IN RECORD ON APPEAL [Cal. Rules of Ct., Rules 1(a), 5(a)]

To the Clerk of the above-entitled Court:

NOTICE IS HEREBY GIVEN that Respondent ROBERT CHEVERES appeals from that order of the above-entitled Superior Court, entered in the minutes of the Court on September 2, 1981. Such order reads as follows:

> "This matter having heretofore been heard and submitted to the court for consideration and decision, and the court having duly considered the same, now orders that respondent's motion to vacate and set aside the order in the Interlocutory and Final Judgments awarding petitioner an interest in respondent's military retirement is denied. See Mahone v. Mahone, 81 Daily Journal D.A.R. 2647 (C.A. 2nd, August 26, 1981)."

NOTICE IS FURTHER GIVEN that Respondent hereby designates the following papers and records on file or lodged with

EXHIBIT B

the Clerk of the above-entitled Court for incorporation in the record on appeal and hereby requests the preparation of a Clerks Transcript which shall include:

Interlocutory Judgment of Dissolution with Property Settlement Agreement attached and filed August 29, 1979;

Final Judgment of Dissolution, filed August 29, 1979;

Amended Notice of Motion to Vacate and Set Aside Military Pension Order with Declaration of Robert Cheveres and Points and Authorities in Support of Motion attached, all filed August 4, 1981;

Minute Order of the Court denying said motion dated September 2, 1981;

Notice of Appeal.

Dated: October 29, 1981

RALPH E. McCARTHY,
Professional Law Corporation

By _____
RALPH E. McCARTHY
Attorney for Respondent

//

(SPACE BELOW FOR FILING STAMP ONLY)

LAW OFFICES OF
RALPH E. McCARTHY
PROFESSIONAL LAW CORPORATION
10TH FLOOR - FINANCIAL PLAZA TOWER
500 ESPLANADE DRIVE
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OXNARD, CALIFORNIA, 93031
(805) 647-8726 • (805) 485-0523

Attorneys for Respondent, ROBERT CHEVERES

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

In re the Marriage of:	
Petitioner: GLENDA CHEVERES	CASE NO. D 98322
and	
Respondent: ROBERT CHEVERES	PROOF OF SERVICE BY MAIL

I am over the age of 18, not a party to this cause, a resident and employed in the county where the mailing took place, and my business address is 500 Esplanade Drive, Oxnard, California 93030.

I served a copy of the NOTICE OF APPEAL; NOTICE DESIGNATING PAPER AND RECORDS FOR INCORPORATION IN RECORD ON APPEAL [Cal. Rules of Ct., Rules 1(a), 5(a)], enclosed in a sealed envelope with postage fully prepaid, in the United States mail, at Oxnard, California, on October 29, 1981, addressed to John H. Pattie, Attorney for Petitioner, Post Office Box 6130, Ventura, California 93003.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on

October 29, 1981, at Oxnard, California.

Patricia A. Bogner

CLAY ROBBINS, JR.
CLERK

CLERK'S OFFICE

Court of Appeal

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
SUITE 301
3580 WILSHIRE BLVD.
PHONE: 736-2391

RECEIVED
FEB 10 1982
ATTY. KLASS, ELLISON

R. N. WILSON
CHIEF DEPUTY
H. W. CUNNINGHAM
G. L. VILLANUEVA
F. G. STAPLETON

R. W. MAYFARTH
P. T. McGILL
R. A. ALBISTON
V. CAREY
L. AGAJANIAN
E. COMBS
DEPUTIES

LOS ANGELES, CALIFORNIA 90010

DATE: 2-4-82

GLENDA CHEVERES

vs

ROBERT CHEVERES

CIVIL NO. 64558

NOTICE TO COUNSEL:

The record on appeal has been filed this date. Pursuant to Rule 16, California Rules of Court, the opening brief is due thirty (30) days from this date.

Enclosed is the court's policy statement for prehearing conferences. If all parties wish to participate in such a conference, written notice should be given to the court within thirty (30) days from this date.

COUNSEL FOR THE PARTIES SHOULD CONFER, IN PERSON OR BY TELEPHONE, IMMEDIATELY UPON RECEIPT OF THIS NOTICE.

IF ALL PARTIES REQUEST A PREHEARING CONFERENCE, THE TIME FOR FILING THE OPENING BRIEF WILL BE EXTENDED AUTOMATICALLY. Notice by counsel for any party which declares that counsel for the other parties join in the acceptance will suffice. PLEASE NOTE, HOWEVER, THAT UNLESS THE REQUEST IS MADE BY OR ON BEHALF OF ALL PARTIES, THE TIME FOR FILING THE OPENING BRIEF IS NOT EXTENDED.

You may, if you wish, indicate your acceptance of this invitation on the enclosed card.

CLAY ROBBINS, JR., CLERK

Enclosures:

EXHIBIT C

POLICY STATEMENT FOR PREHEARING CONFERENCES IN CIVIL APPEALS COURT OF APPEAL, SECOND DISTRICT

1. PREHEARING CONFERENCE PROCEDURE:

The statement of policy is adopted pursuant to rule 19.5, California Rules of Court.

2. NOTICE OF AVAILABILITY OF PREHEARING CONFERENCE:

Immediately after the record on appeal has been filed with this court, the clerk shall send to counsel of record of all parties to the appeal notice of the availability of a prehearing conference. Upon request by counsel for all parties, an appellate conference will be scheduled and written notice of the date of the conference given by the clerk.

3. REQUEST FOR PREHEARING CONFERENCE:

If counsel for the parties to the appeal desire a prehearing conference, they shall notify the clerk of this court in writing no more than 30 days after the notice of availability is mailed. Notice by counsel for any party which declares that counsel for the other parties join in the request is adequate for this purpose.

Except as provided in paragraph 4, the time for filing briefs is not automatically extended during the 30-day period stated in this paragraph 3.

4. POSTPONEMENT OF BRIEFING:

Upon receipt by this court of notice that all parties request a conference, the time for filing briefs shall be suspended until the settlement conference judge determines that the briefing time shall commence.

5. COURT ORDERED CONFERENCE:

Whether counsel have requested a prehearing conference or not, the division to which the case has been assigned for decision may in its discretion refer the case to the settlement panel, for a conference before a judge who is not a member of the division to which the case has been assigned. The judge to whom the case is assigned for conference may order that a conference be held. Such an order suspends all further proceedings in the appeal.

6. LATE REQUESTS FOR CONFERENCE:

Notwithstanding the failure to request a conference within the time specified and the failure of the court to order a conference on its own motion, counsel for any party may request a prehearing conference at any time prior to argument. The request must be in writing with a copy to counsel for all other parties. The court will act promptly to grant or deny the request.

7. EARLY REQUESTS FOR CONFERENCE:

The court will consider requests for conference made by counsel for all parties prior to the filing of the record on appeal. The court may hold a conference where there is a showing of a need but before the record is filed.

8. THE PREHEARING CONFERENCE:

Counsel shall be prepared to discuss at conference the possibility of settlement and the possibility of the simplification of issues on appeal. The conference judge may invite counsel to consider other matters to aid in the expeditious resolution of the appellate controversy.

Counsel for the parties shall be fully prepared to discuss issues arising in conference. They may have their clients available to join in the conference if all counsel agree to do so. The conference judge may continue the prehearing conference from time to time if he deems the continuance fruitful to the purposes of the conference.

9. THE PANEL OF SETTLEMENT JUDGES:

A panel of settlement judges shall be established, made up of at least one judge from each division participating in the settlement program. The judges of the settlement panel shall establish their own procedure for assigning and reassigning cases among themselves.

10. ASSIGNMENT OF MATTERS FOR CONFERENCE:

(a) Assignment of civil cases to a division shall not be made during the 30 days following the mailing of the clerk's notice pursuant to paragraph 2 except when the pendency of a motion makes such assignment necessary.

(b) If, prior to assignment of the case to a division, the parties request a conference, the case shall not be assigned to a division until the settlement judge has determined that conference proceedings are concluded or that assignment to a division should be made for some other reason.

(c) Assignments of civil cases to a division shall be made by order of the Presiding Justices in accordance with prior practice, except that a case will not be assigned to a division in which the conference judge for that case sits.

11. CONFIDENTIALITY:

The conference judge shall hold in confidence all discussions at the prehearing conference except as counsel may otherwise agree. A judge may not participate in the decision on appeal in any case in which he has acted as a conference judge.

Court of Appeal
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

L. Thaxton Hanson
Justice

March 25, 1982

RECEIVED
MAR 29 1982
HEILY, BLASE, ELLISON

John H. Pattie, Esq.
Heily, Blase, Ellison & Wellcome
P. O. Box 6130
Ventura, California 93003

Ralph E. McCarthy, Esq.
P. O. Box 6408
Oxnard, California 93031

Re: In re Marriage of Glenda and Robert Cheveres
2 Civil No. 64558

Gentlemen:

In accordance with your request, the subject case has been assigned to me for a prehearing conference.

Experience has shown in attempting to settle civil matters at any stage of the proceedings including at the appellate level that the parties and counsel must come with a conscientious desire to dispose of the matter and put it behind them. This includes the fact of life that there must be flexibility and a willingness to give and take in order to move from the status quo position. If any single party or counsel does not honestly possess this frame of mind or attitude, I suggest you so advise the clerk of the court so the settlement conference will not be scheduled and thus avoid wasting the time of other counsel and the court.

In order not to delay the appellate process, a settlement conference should be promptly set. Accordingly, I will be available either Monday, April 5, 1982, or Wednesday, April 7, 1982, at 10:00 a.m. I would appreciate counsel conferring and calling my secretary at (213) 736-2611 within one week from the date of this letter to confirm one of the above dates.

Very truly yours,

L. Thaxton Hanson

LTH/jb

Law Offices of
Ralph E. McCarthy
Professional Law Corporation

10th Floor
Financial Plaza Tower
300 Esplanade Drive
P.O. Box 6408
Oxnard, California 93031
(805) 647-8726
(805) 483-0323
File:

March 30, 1982

Secretary to
L. Thaxton Hanson, Justice
Court of Appeal
State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

Re: In re Marriage of
Glenda and Robert Cheveres
2 Civil No. 64558

Dear Madam:

Pursuant to our telephone conversation of March 29, 1982, opposing counsel and myself have agreed, and cleared with your office, that the settlement conference may be continued to June 1, 1982 at 10:00 a.m.

As indicated to you, we are expecting a ruling from the United States Supreme Court which may well resolve the matter prior to that time and will notify you immediately if this occurs. Otherwise, we shall both appear at the above date unless other arrangements are made.

Thank you for your courtesy.

Cordially,

RALPH E. McCARTHY
Professional Law Corporation

By /s/
Ralph E. McCarthy

REM:eml
cc: John H. Pattie

VERIFICATION BY PARTY (446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

_____

in the above entitled action; I have read the foregoing _____

_____

and know the contents thereof, and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ *(date)* *at* _____ *(place)*, *California*

_____

Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is:

5550 Telegraph Road, Ventura, California

On April 27 , *19* 82 , *I served the within* RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

on the interested parties *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Ventura, California *addressed as follows:*

Ralph E. McCarthy
Attorney at Law
500 Esplanade Dr.
10th Floor
Oxnard, CA 93030

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 27, 1982 *(date)* *at* Ventura *(place)*, *California*

_____

Signature

LAURI S. CLAPP

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 81-1497

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1981

ROBERT CHEVERES,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA, GLENDA CHEVERES MILLER (Real Party in Interest),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

RALPH E. McCARTHY
Professional Law Corporation
By RALPH E. McCARTHY
500 Esplanade Drive, 10th Floor
Oxnard, California 93030
(805) 485-0523

Counsel for Petitioner

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Case No. 81-1497

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1981

ROBERT CHEVERES,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF VENTURA, GLENDA CHEVERES MILLER (Real Party in Interest),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

PROCEDURAL BACKGROUND

Respondent correctly asserts that Petitioner's motion to vacate and set aside both portions of the Interlocutory and Final Judgments awarding Res-

pondent a portion of Petitioner's military retirement pay on the grounds said orders exceeded the jurisdiction of the trial court under this court's decision in **McCarty v. McCarty**, (1981) 452 U.S. _____, 101 S. Ct. 2728, 69 L. Ed. 2d 589, was denied on September 2, 1981. (Pet's App. Ex. A.) The Respondent is further correct in stating Petitioner filed a petition for writ of mandate in the Supreme Court of California on October 9, 1981 which court transferred the petition to the California Court of Appeals, Second Appellate District, and that court in turn denied said petition by order on October 27, 1981.

Since the granting of extraordinary writs in original proceedings in California is sometimes held discretionary and not a matter of right, (See e.g. **Rogers v. Board of Directors**, (1933) 218 Cal. 221, 224, 22 P. 2d 509) Petitioner, as a precautionary measure since appeal time was expiring filed and served a Notice of Appeal from the trial court's order of denial on October 29, 1981, and then proceeded on or about November 3, 1981 to petition for hearing in the California Supreme Court from the Second Appellate District's denial of petition for writ of mandamus, and the California Supreme Court in turn denied the petition for hearing on November 25, 1981.

Since the later order was a final adjudication of the application for writ of mandamus by the highest State Court, Petitioner timely filed the instant petition for certiorari, in the U.S. Supreme Court.

At the request of the court Respondent has served a response, in which the sole matter raised by Respondent is the pendency of appeal in the Second Appellate District of the California District Court of Appeals, and by reason thereof, the Respondent contends the present petition for certiorari is premature. As shown by letter dated March 30, 1982 to the Second Appellate District attached to the declaration of John Pattie on behalf of Respondent, a part of the response filed herein, by agreement and request of counsel appeal proceedings have been continued awaiting a determination by this court of the present petition for certiorari.

ARGUMENT

I

JUDGMENT BY THE CALIFORNIA SUPREME COURT DENYING THE ORIGINAL APPLICATION FOR MANDAMUS, IS A FINAL JUDGMENT REVIEWABLE BT THIS COURT UNDER 28 U.S.C. §1257, EVEN IF SUBSEQUENT PROCEEDINGS BY APPEAL

IN THE LOWER STATE COURT ARE PENDING.

This court has repeatedly directly held that the judgment of the highest state court with respect to denying or granting a writ of mandamus constitutes a "final" judgment reviewable by the U.S. Supreme Court. **Nebraska Press Assn. v. Stuart,** (1975) 423 U.S.1327, 96 S. Ct. 251, 46 L. Ed. 2d 337 (Failure to act by a state court deemed denial of mandate - final and reviewable) ; **Pacific Coast Dairy v. Department of Agriculture of California,** (1943) 318 U.S. 285, 63 S. Ct. 628, 87 L. Ed. 761 (Judgment in mandamus proceedings brought during pendency of main action) ; **Detroit & M.R. Co. v. Michigan R. Comm.,** (1916) 240 U.S. 564, 36 S. Ct. 424, 60 L. Ed. 802 (Order granting mandamus reviewable even if order might ultimately be vacated in pending suit).

In **Hartman v. Greenhow,** (1880) 102 U.S. 672, 676, 26 L. Ed. 271, the court in reviewing an order denying mandamus stated:

> "Nor does it matter that the judgment was rendered in an original proceeding in the Supreme Court of Appeals of Virginia, and not in a case pending before that court on appeal. It is enough for our jurisdiction that the judgment is by the highest tribunal of

> the state in which a decision could be had in the suit. When such judgment is brought before us for review, involving in its rendition a decision upon a federal question, we do not look beyond the action of that court. It is enough that we have its final judgment in the case, whether it be one of original jurisdiction or heard by it in the excercise of its own appellate power over the inferior courts of the state."

In special original proceedings other than mandamus this court has followed the same rule. **Madruga v. Sup. Ct. of Calif.** (1954) 346 U.S. 556, 557 n. 1, 74 S. Ct. 298, 98 L. Ed. 290 (prohibition) ; **Bandini v. Sup. Ct.,** (1931) 284 U.S. 8, 14-15, 52 S. Ct. 103, 76 L. Ed. 136 (prohibition) ;**Betts v. Brady,** (1942) 316 U.S. 455, 460-61, 62 S. Ct. 1252, 86 L. Ed. 1595 (habeas corpus - even though issues may arise in the subsequent proceedings).

In **Fisher v. Dist. Ct.**, (1976) 424 U.S. 382, 385 n. 7., 96 S. Ct. 943, 47 L. Ed. 2d 106, this court stated:

> "A judgment that terminates the original proceedings in a state appellate court in which the only issue decided concerns the jurisdiction of the lower state court, is final, even if further proceedings are to be held in the lower court."

In the present case in the trial court, Petitioner motioned and attacked the order affecting military retirement pay as "in excess of the jurisdiction" of that court under **McCarty, supra.**; the only substance of the issue was therefore "concerning jurisdiction" within the meaning of **Fisher** case, and is therefore final and reviewable by this court.

II

PRACTICAL CONSIDERATIONS DICTATE FINALITY OF THE CALIFORNIA SUPREME COURT DENYING HEARING IN THE PRESENT CASE.

This court has demonstrated it will give **practical**, not technical, construction to the concept of finality. See e.g., **Construction & General Laborer's Union v. Curry**, (1963) 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531.

The only issue involved in the present proceeding is the question of retroactivity of **McCarty**, clearly a federal question. The California Appellate Courts have already repeatedly held **McCarty** nonretroactive; see e.g., **Marriage of Sheldon** (1981) 124 C.A. 3d 371, 177 C.R. 380; **Marriage of Mahone**, (1981) 123 C.A. 3d 17, 176 C.R. 274 (Second District same as appeal in this case); c.f. **Marriage of Jacanin** (1981) 124 C.A. 3d 67, 177 C.R. 86.

Therefore the outcome of an appeal on the question in the California Appellate Court is clearly predictable and renders the processing of an appeal through the California Appellate Courts a futile move by Petitioner only resulting in delay. It is estimated that appeal proceedings would consume well over another year and to require Petitioner to proceed through this academic exercise, while continuing to pay portions of his military retirement pay during said period, all in order to eventually present the same question of retroactivity of **McCarty** to this court again on petition after appeal is to ignore realties in favor of technicalities in the construction of finality.

Meanwhile conflict has already developed between the California Appellate Court's decisions above cited holding **McCarty** nonretroactive, and the courts of other states holding **McCarty** is retroactive. See **Ex Parte Acree** 623 S.W. 2d 810 (Tex. App. 1981).

CONCLUSION

The decisions of this court clearly indicate that denial of mandamus by the Second Appellate District Court and subsequent denial of hearing by the California Supreme Court, constitutes a "final" judgment under 28 U.S.C. §1257. The **national importance** of the question raised, and the effect on thousands of military personnel awaiting a determination by this court of retroactivity in **McCarty**, dictate a practical interpretation that the denial of mandamus in the present

case is a "final" judgment, and therefore reviewable in the instant proceeding.

For the foregoing reasons and those stated in the petition herein, the writ should be granted.

Respectfully submitted,

RALPH E. MCCARTHY
PROFESSIONAL LAW CORPORATION
By Ralph E. McCarthy
Counsel for Petitioner.